No. 3377

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LIM CHAN,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

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Statement of the Case.

This is an appeal from an order of the Southern Division of the United States District Court for the Northern District of California, First Division thereof, denying the petition for a writ of *habeas corpus,* and ordering the remand of the detained, Lim Chan, the appellant herein, into the custody of the appellee for the purpose of returning him to China.

This appellant applies to enter the United States as the minor son of a resident Chinese merchant lawfully domiciled therein. The minority of the

appellant is conceded, as also is the fact that the father is a merchant lawfully domiciled within this country, together with the further fact that there are no prohibitive features attached to the father's business. The sole issue raised by the appellee as the Commissioner of Immigration, is that of relationship, that is to say, whether this appellant is the son of the person whom he claims as his father, and who in turn claims him as his son.

Appellant contends that the evidence submitted upon his behalf was of such a positive nature and conclusive character establishing the existence of the disputed relationship, that in refusing to be guided thereby and in finding adversely thereto, the Commissioner of Immigration abused the discretion vested by law in the governmental officer or officers whose duty it was to have decided and determined said case. Upon appeal to the Secretary of Labor the excluding decision was affirmed and said action is also contended to be in abuse of the discretion conferred by statute. The appellant contends that the discrimination mentioned was indulged in solely because the principals were persons of the Chinese race. That they were treated in a prejudicial manner and their case determined in a manner contrary to the favored nation clause contained in the treaty with China which assures to them all of the rights, privileges, immunities and exemptions which are accorded the subjects of the most favored nation. Solely because appellant was an alien Chinese person, his case was determined by

the Commissioner of Immigration, whereas all aliens other than Chinese have the right to have their cases determined by a Board of Special Inquiry consisting of three Immigration Inspectors wherein he would have had an enlarged opportunity to present his case and have it properly determined.

Argument.

The following two points are involved in this case:

First: Whether an alien Chinese is entitled as of right, by statute, or the favored nation clause of the treaty, upon applying for admission to the United States, to have his case, when doubt is entertained as to his admissibility, determined by a Board of Special Inquiry as provided by statute.

Second: Whether there was an abuse of discretion in disregarding the positive and conclusive character of the evidence presented establishing the existence of the relationship as claimed by appellant.

First.

WHETHER AN ALIEN CHINESE IS ENTITLED AS OF RIGHT, BY STATUTE, OR BY THE FAVORED NATION CLAUSE OF THE TREATY, UPON APPLYING FOR ADMISSION TO THE UNITED STATES, TO HAVE HIS CASE, WHEN DOUBT IS ENTERTAINED AS TO HIS ADMISSIBILITY, DETERMINED BY A BOARD OF SPECIAL INQUIRY AS PROVIDED BY STATUTE.

This point as applicable to a person of the Chinese race who claims American citizenship, was presented to this court and upheld in the recent cases of Quan Hing Sun v. White, 254 Fed. 402, and Jeong Quey How v. White, 258 Fed. 618. Since the rendition of the earlier of the two decisions the Commissioner General of Immigration with the approval of the Secretary of Labor, has amended the rules and regulations as applicable to all Chinese persons applying for entry into the United States, so that when doubt is entertained as to the admissibility of any Chinese person, irrespectively whether his claim of admission is based upon citizenship or as an alien member of the exempt classes, his claim is to be primarily determined by a Board of Special Inquiry. What appellant asks in this regard is what is now accorded under the existing practice to all alien Chinese applying for entry into the United States. At the time of his application to enter it was a right withheld while now it is a right accorded.

The favored nation clause of the treaty with China is as follows:

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

Article II, Treaty between the United States and China, concerning Immigration. (22 Stat. L. 826).

The Congress of the United States by its Act of June 6, 1900 (31 Stat. L. 588-611), in making appropriations for sundry civil expenses and for other purposes, placed the Commissioner-General of Immigration in charge of the administration of the Chinese-exclusion law and of the various acts regulating immigration, under the supervision and direction of the Secretary of the Treasury. By the Act of February 14, 1903 (32 Stat. L. 825), the Department of Commerce and Labor was created and the Commissioner-General of Immigration, the Bureau of Immigration, and the Immigration Service was transferred from the Treasury Department to the newly created Department; and by the Act of March 4, 1913 from that Department to the newly created Department of Labor. By the General Immigration Laws the Commissioners of Immigration for the various ports of admission, have executive powers only, the Immigration Inspectors. in the first instance, and three of them collectively

when convened as a Board of Special Inquiry after an applicant for admission is held, have the power to determine the admissibility or non-admissibility of all aliens. In the event of a denial or a difference of opinion a right of appeal exists to the Secretary of the Department. The Commissioners of Immigration at the various ports of entry are excluded entirely from determining the admissibility or non-admissibility of applicants for admission. So this appellant contends that as an alien he was as of right, under the treaty and the statutes mentioned above, entitled to have his case determined before a Board of Special Inquiry, a right accorded to all other aliens, and as the treaty secures to him equal rights, privileges, immunities and exemptions, with the subjects of the most favored nations, this it seems is his due.

The conclusion contended for seems to be that reached by the Secretary of Labor and the Commissioner-General of Immigration for since the 4th and 5th of last March, following the decision of this court in the case of Quan Hing Sun v. White. *supra,* the former existing regulations were amended to accord to all Chinese applicants for admission, irrespective of the ground of the application, that is whether citizenship or as a member of the exempt classes of alien Chinese entitled to admission under the treaty and the statute, a hearing before a Board of Special Inquiry, when any question was raised as to their right of entry. What this appellant asks for his protection from this court is what

the respondent has ever since the 4th and 5th days of March of the present year, accorded to alien Chinese applicants for admission. He contends that he is entitled to have his case determined in the same manner and by the same procedure as any other alien person. That the Chinese persons come under the provisions of the Immigration Law is a settled question.

24 Op. Atty. Gen. 706;
In re Lee Sher Wing, 164 Fed. 506;
Looe Shee v. North, 170 Fed. 566;
U. S. v. Wong You, 223 U. S. 67;
Low Wah Suey v. Backus, 225 U. S. 673.

These decisions were all rendered under the earlier Immigration Laws. The last and present General Immigration Law is much more conclusive upon this point than any of the earlier laws. Section 1 defines the word "alien" with remarkable clarity. Sections 16 and 17 covers the procedure to be followed by the government officers when a person *applies to enter* this country. Note the first part of Section 17:

> "That boards of special inquiry shall be appointed by the commissioner of immigration or inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law."

The universality of expression *"the law"* is meant to embrace the entire body of the law and is not limited to *"this law"*. Note further the pro-

visions of Section 19 covering *deportation* procedure, the second clause being as follows:

> "any alien who shall have entered or who shall be found in the United States in violation of this act, or in violation of any other law of the United States;"

thus showing a common purpose as affecting admission and deportation cases.

It is true that Section 38 provides:

> "That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in section nineteen hereof,"

and makes no mention of Sections 16 and 17 but it is contended that such a reference is unnecessary, and had mention been made of them it would have been surplusage pure and simple. Part of the laws so held in force relating to the admission of Chinese was the said earlier act of June 6, 1900 placing the administration of these laws and of the various acts regulating immigration in charge of the Commissioner-General of Immigration, under the supervision and direction of the Secretary.

Second.

WHETHER THERE WAS AN ABUSE OF DISCRETION IN DISREGARDING THE POSITIVE AND CONCLUSIVE CHARACTER OF THE EVIDENCE PRESENTED ESTABLISHING THE EXISTENCE OF THE RELATIONSHIP AS CLAIMED BY APPELLANT.

Upon this point the courts have repeatedly held that discretion may be abused by disregarding and

finding adversely to a positive and conclusive showing. In other words that the discretion committed to the Immigration authorities is a *legal* discretion and not an *arbitrary* one. Cases illustrative of this point are

Low Wah Suey v. Backus, 225 U. S. 673;
Tang Tun v. Edsell, 223 U. S. 673;
Ong Chew Lung v. Burnett, 232 Fed. 853;
Chan Kam v. United States, 232 Fed. 855;
Ex parte Chin Loy You, 223 Fed. 833;
Ex parte Wong Foo, 230 Fed. 534;
Ex parte Leong Wah Jam, 230 Fed. 534;
Ex parte Ng Doo Wong, 230 Fed. 751;
Ex parte Lee Dung Moo, 230 Fed. 746;
Ex parte Tom Toy Tin, 230 Fed. 747;
Chin Fong v. White, 258 Fed. 849;
Ex parte Long Lock, 173 Fed. 208;
Ex parte Lee Kow, 161 Fed. 592;
U. S. v. Chin Len, 187 Fed. 544.

In this case there are certain fundamental facts that stand forth and can neither be denied or gainsaid. The father of this appellant is admitted and conceded to be a merchant in the full meaning of that term as the same is used in the Chinese Exclusion Laws and that fact has been established by the class and kind of testimony exacted by the Act; that is, the testimony of two credible witnesses other than Chinese. The store has been examined, the books of the firm inspected, and all else according to the full desires of the immigration authorities. As to the other points relied upon it is to be observed that

the father is a man of suitable and sufficient years to be the father of the appellant, that he was in China at a time which would have enabled the paternity to be possible, that upon his return to the United States he mentioned his wife and children and testified about them as fully as the then immigration authorities thought advisable, and when the applicant was compared with his father by the examining inspector he noted a physical resemblance between them. He further certified in his abstract of record and report that none of the witnesses were disqualified according to the records of their office and that their demeanor while under examination was good. He further certifies that the applicant is a minor and about the age claimed. That the testimony is preponderant in favor of the existence of the relationship cannot be disputed. The authorities have sought to discredit it by calling attention to certain variances between the testimony of the witnesses. These are not matters of importance nor are they of a character to impeach the credibility or standing of the witnesses. The fact that the father, who has lived here in recent years did not know of the marriage of one of his daughters in China during his absence, need occasion no wonder. Chinese women do not write and the mail facilities in the interior of China are crude and primitive almost beyond belief. It is of record in the father's testimony that he received about three letters a year from his family, consisting of his wife and two sons and two daughters. The status of women in

China is not what it is with us. Quoting from a most estimable work "Things Chinese" by J. Dyer Ball (Fourth Edition, Revised and Enlarged) pages 762 and 763 under the caption "Woman, the status of" the following appears:

> "Woman, in China, occupies a totally different sphere from that of a man; a sphere which, though it must of necessity touch that of man at certain points, should be kept as separate as possible. At the early age of seven, according to the practice of the ancients, 'boys and girls did not occupy the same mat nor eat together'; and this is still carried to such an extent that a woman's clothes should not hang on the same peg as a man's, nor should she use the same place to bathe in. The finical nonsense that all this engenders is sometimes absurd; it is not even proper for a woman to eat with her husband." * * *

> "Woman is made to serve in China, and the bondage is often a long and bitter one; a life of servitude to her parents; a life of submission to her parents-in-law at marriage;" * * * "All these restrictive customs are based on the idea that woman occupies a lower plane than man; he is the superior, she the inferior; as heaven is to earth, so is man to woman." * * * "Does her husband have friends at his house? She is invisible, a nameless thing, for it would be an insult for a visitor to enquire after his host's wife."

> "Of so little account is woman in China, that a father, if asked the number of his children, will probably leave out the girls in reckoning; or, if he has no boys, his reply will be 'only one girl', said in such a tone of voice, as to call forth the sympathy of his listener for his unfortunate position."

After reading the above could there be any just or reasonable criticism for a variance between the testimony of the appellant and his father as whether the women in the houses adjoining his had bound or natural feet. Where an examination refers to the immediate family, uniformity in this regard would be expected, but, when referring to the women neighbors it is an entirely different matter.

There is a further discrepancy having to do with an accident which the father testified as having sustained when in Hongkong, of spraining his knee. The father is possibly exaggerating his condition on the one hand and the applicant not regarding the matter as at all serious, professes not to remember it. This is not unusual when we consider the alienage of these people and the fact that they have to submit themselves to a very rigid health examination. It is probable that the appellant all the voyage over from China, had the dread in his mind of the physical examination which he and all of the other passengers would have to undergo upon arrival. He knew that his father must have had the same dread in his mind upon his return to this country the preceding year, and hence concluded that this accident would have been the last thing in the world that his father would have testified about, and so he probably concluded to make no mention of it. The point that we desire to make with respect to these matters of discrepancy is that they were the determinating factors which caused the examining inspector to discredit the case. By referring

to his Abstract of Record and Report we find the following:

> "Do you believe relationship as alleged exists? No.
>
> If not, is your adverse opinion based upon the discrepancies in testimony? Yes.
>
> If your opinion is adverse to relationship claims made, would it be otherwise if you disregarded the discrepancies in testimony? Yes."

From the above we see clearly that these discrepancies were the determinating factor in the examining inspector's mind, and that if they can or may properly be laid out of the case, that then and in that event, his opinion would be in favor of the existence of the relationship. None of these matters bear at all upon the question of relationship which is the only question in dispute and hence they should, it is submitted, be laid out of the case. Upon this point attention is directed to a recent opinion of Judge Dooling in the case of Lum You on Habeas Corpus, No. 16,617, in the records of the lower court wherein on September 16, 1919, it was held as follows:

> "The record shows that petitioner was admitted to this country in January, 1910, as the son of a native born citizen of this country. He was then about 12 years old. In 1916 he returned to China without a pre-investigation of his status, because the serious illness of his mother in China whom he desired to see, did not afford him time for such pre-investigation. Returning in March, 1919, he was denied admission because of certain discrepancies between his testimony and that of his alleged father and

> because of other discrepancies in the testimony of the father given at different times in regard to the conditions in the home village. None of these latter seem to bear at all upon the question of relationship, which is the only question in dispute.
>
> The rights of one whose status as an American Citizen has already been determined, who has lived a number of years in this Country without question, should be, it seems to me, more stable than to be overturned by the evidence in the present case, much of it having nothing at all to do with the question at issue. I do not mean that a first, or second, or third adjudication of status by the Department is final, or that it may not later be set aside, but I do mean that there should be some substantial reason for so doing. To my mind such does not appear in the present case."

The position of this appellant with respect to the evidence of this case is that the examining inspector who alone came in contact with the witnesses under examination states as follows:

> "What was demeanor of all witnesses during examination? O. K.
>
> Are any of them substantially discredited before this office? Not to my knowledge."

and also as follows:

> "Is there resemblance between alleged father and applicant? Expression of eyes somewhat similar."

He was satisfied with the existence of the relationship if the discrepancies were disregarded. We are therefor in a position to state that by the elimination of the discrepancies, the finding from the

evidence by the examining inspector was in favor of the existence of the relationship. These discrepancies are on a par with those mentioned in Lum You, *supra,* as not bearing at all upon the question of relationship, which is the only question in dispute, and that the inspectors otherwise favorable finding on the issue of relationship should be more stable than to be overturned by the discrepancies in the present case much of which has nothing to do at all with the question at issue, namely, relationship.

Where the reason for the denial may be laid out of the case and eliminated from further consideration, and where what remains is entirely in favor of the ground for admission and sufficient to sustain it, and admittedly such is the case here for the examining inspector has reported that his opinion is in favor of the *bona fides* of the case, if he disregarded the discrepancies, then the court may proceed to final judgment. That was the holding of this court in the case of Chin Fong v. White, 258 Fed. 849. This court would not be called upon to weigh the evidence, that being the province of the inspector, but in the case at bar, the court is but asked to accept the determination of the inspector. who has himself appraised or weighed the testimony and the evidence, in the event that the discrepancies are laid out of the case, by his report that in that contingency his opinion and conclusion would be in favor of the case. One cannot read the record in this case without being impressed with the belief that there has been discrimination, racial

discrimination, indulged in. Under the section of the treaty quoted herein, this exempt merchant would be entitled to bring into this country his "*body and household servants*" so why would he misrepresent this applicant as his son? There would be no reason for it.

In finally submitting this matter we do so firm in the belief and conviction that there has been discrimination indulged in against these witnesses and this appellant solely because they were all of the Chinese race, and this in spite of the treaty guarantee mentioned above. They have not, we most respectfully submit, been accorded the same mutuality of hearing and consideration of their case, as are guaranteed them by the treaty obligations, nor directed by the various statutes mentioned. In view of the foregoing it is most respectfully urged that the judgment of the lower court be reversed, with instructions to issue the writ of *habeas corpus* as prayed for, to the end that the appellant may be discharged from custody and that he may go hence without day.

Dated, San Francisco,
October 27, 1919.

Respectfully submitted,

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Attorneys for Appellant.